STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2007
v	No. 264594 Oakland Circuit Court
ROY EDGAR WHITE, Defendant-Appellant.	LC No. 04-195032-FH

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 12 to 30 years' imprisonment for the conviction. We affirm.

Defendant first argues that the trial court erred in denying his pretrial motion to suppress evidence that was found following an investigatory stop and frisk. Defendant contends that the stop and frisk was illegal because Sergeant Timothy Boal, the investigating officer, did not have a reasonable suspicion that defendant was armed.

A trial court's ultimate decision on a motion to suppress is reviewed de novo. *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005), citing *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). However, this Court reviews a trial court's factual findings at a hearing on a motion to suppress for clear error, giving deference to the trial court's resolution of factual issues. *Id*. Moreover, the question of whether the officer's suspicion was reasonable under the Fourth Amendment is a question of law that this Court reviews de novo. *People v Bloxson*, 205 Mich App 236, 245; 517 NW2d 563 (1994).

"The Fourth Amendment of the United States Constitution and the analogous provision in Michigan's Constitution guarantee the right of the people to be free from unreasonable searches and seizures." *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996) (footnote omitted), citing US Const, Am IV; Const 1963, art 1, § 11. Generally, the exclusionary rule precludes the admission of evidence obtained during an unconstitutional search or seizure. *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003).

"[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibl[e] criminal behavior even though there is

no probable cause to make an arrest." *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). "'Police officers may make a valid investigatory stop if they possess a 'reasonable suspicion' that criminal activity is afoot.'" *People v Custer*, 465 Mich 319, 327; 630 NW2d 870 (2001), quoting *Champion, supra* at 98. "The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances." *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001), quoting *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996). Further, in determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed "as understood and interpreted by law enforcement officers . . . . [c]ommon sense and everyday life experiences predominate over uncompromising standards." *Oliver, supra* at 192 (internal citations and quotations omitted). "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Champion, supra* at 98. The reasonable suspicion necessary for an investigatory stop requires a showing considerably less than preponderance of the evidence. *Oliver, supra* at 202-203.

"An officer who makes a valid investigatory stop may perform a limited pat down search for weapons if the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer." *Champion*, *supra* at 99. The scope of a pat down search is limited to that which is "reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer." *Id*., citing *Adams v Williams*, 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972). The court must determine "whether a reasonably prudent [officer] in the circumstances would be warranted in the belief that [the officer's] safety or that of others was in danger." *Custer*, *supra* at 328. The officer must be able to articulate specific facts, which together with rational inferences from those facts, reasonably warrant the intrusion. *Terry*, *supra* at 21. The determination whether a pat down search is justified is made by examining the totality of the circumstances with which the police officer is confronted. *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993). As the Supreme Court noted in *Florida v Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion):

> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

However, "not every encounter between a police officer and a citizen requires" reasonable suspicion to make an investigatory stop. *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). As our Supreme Court noted:

> A "seizure" within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave. *People v Mamon*, 435 Mich 1, 11; 457 NW2d 623 (1990). When an officer approaches a person and seeks voluntary cooperation through

> noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized. [*Royer, supra* at 497-498]. [*Jenkins, supra* at 32-33 (footnotes omitted).]

Boal's initial encounter with defendant was consensual. See *Jenkins, supra* at 33. The record from the evidentiary hearing reveals that Boal approached defendant on the street in his patrol car and initially questioned him regarding "how he was doing" and whether defendant was looking for employment. Further, Boal requested and defendant produced his identification. The Fourth Amendment is not implicated when an officer asks a person for identification. *Id*., citing *Hiibel v Sixth Judicial Dist Court of Nevada,* 542 US 177, 186; 124 S Ct 2451; 159 L Ed 2d 292 (2004). During Boal's initial line of questioning, a reasonable person in defendant's person would have concluded that they were free to leave. Thus, defendant was not "seized" within the meaning of the Fourth Amendment. *Id*. at 34. However, Boal then exited the patrol car and told defendant that he needed to check and make sure he "didn't have anything on him" and placed his hand on defendant's shoulder. Because Boal hindered defendant's movement, a reasonable person would have concluded that he was not free to leave the scene and defendant's Fourth Amendment rights were then implicated. *Id*. Accordingly, whether Boal had legal cause to conduct a stop and frisk must be determined.

The facts surrounding the stop of defendant indicate that Boal had a reasonable suspicion that criminal activity was afoot and that defendant could be armed. Accordingly, Boal was justified in conducting an evidentiary stop and a pat down of defendant's person. The record from the evidentiary hearing shows that Boal was dispatched at approximately 5:50 a.m. on Sunday, July 20, 2003, to respond to a suspected malicious destruction of property call. Boal encountered defendant shortly thereafter at 6:15 a.m. Defendant was on foot in a residential neighborhood approximately one-half to three-quarters of a mile away from the scene of the crime. At the time, no other pedestrians were on the road. Boal testified that when he first saw defendant he was walking out from beside a house onto the street coming from the direction of the scene of the crime. Additionally, the record shows that defendant was acting nervous and could not stand still during the encounter. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Oliver, supra* at 197, citing *Illinois v Wardlow,* 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000). Boal also testified that, based on his experience, defendant's explanation that he was looking for "lawn jobs" that early in the morning was uncommon and caused Boal to become suspicious. Further, defendant indicated that he lived approximately five miles away, but he could not specify his exact address. At that point, Boal received information over the radio that the crime had been elevated to a suspected home invasion. Boal then exited the patrol car, and saw that defendant had a bulge on his hip underneath his shirt. Boal testified at the evidentiary hearing that, based on his prior police experience, it is common for a home invasion suspect to be armed with some type of weapon and that, after he noticed the bulge, he wanted to ensure his safety by conducting a pat down to determine whether defendant had a weapon. At that point, Boal had an immediate interest in protecting himself against armed violence when, on the basis of his experience as a police officer and his observations of defendant, he believed that defendant was armed. See *People v Taylor,* 214 Mich App 167, 171; 542 NW2d 322 (1995) (noting that an officer's observation of a bulge in the front of the defendant's jacket in the waist area provided particularized suspicion to stop and frisk). Examining the totality of the circumstances, we conclude that Boal had a reasonable

suspicion that (1) criminal activity was afoot and (2) defendant may have possessed a weapon. Accordingly, the trial court properly determined that the initial stop and frisk was reasonable.

Furthermore, Boal was justified in briefly discontinuing the initial pat down, radioing for additional assistance and continuing the investigatory stop and frisk at a nearby location. Boal did not complete his initial stop and frisk because of defendant's actions toward Boal. Boal testified that when he placed his hand on defendant's shoulder and lifted his shirt to examine the bulge during the initial pat down, Boal felt defendant "tense up." Although Boal briefly glimpsed the open "fanny pack" and saw what he thought was a cell phone and not a weapon, he decided to let defendant go because, based on his experience, defendant was either "going to fight or he's going to run." This initial stop and frisk took "seconds." Afterward, Boal returned defendant's identification and "pretended" to let defendant go free; however, because Boal had determined that he needed additional assistance to complete the pat down, he radioed for backup and followed defendant in his patrol car as defendant continued walking down the street. Boal and additional police officers approached defendant and re-obtained his identification. The second investigatory stop occurred within a few hundred feet of the first.

As our Supreme Court has noted, the purpose of the frisk during an investigatory stop is to allow an officer the opportunity to ensure his safety and the safety of other individuals. *Custer, supra* at 328. It is reasonable for a solo officer, who is engaging a defendant without any assistance, to briefly discontinue a stop and frisk and wait for additional officers to arrive if the officer determines that, based on the defendant's actions, his safety or the safety of others is at risk. Furthermore, a review of the totality of the circumstances in the present case reveal that the initial stop and frisk was not completed because Boal sensed that there might be some problems and for his own safety. Accordingly, the trial court properly determined that Boal had a reasonable suspicion to stop and frisk defendant again.

Furthermore, after stopping defendant a second time and again obtaining his identification in the presence of two other officers, Boal received information that a cell phone was missing from the crime scene. When Boal approached defendant to question him regarding this new information, defendant unsuccessfully attempted to flee and was subsequently subdued and handcuffed by the officers. Based on the facts known to the officers at that point and defendant's attempts to elude them, the officers had probable cause to arrest defendant. *Champion, supra* at 115; see also *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995) (noting that flight may be indicative of a defendant's consciousness of guilt). The officers could then conduct a search incident to arrest. *Champion, supra* at 115 (noting that "[a] search of a person incident to an arrest requires no additional justification.") Thus, the items found on defendant's person during the search were properly admissible at trial. Accordingly, the trial court properly denied defendant's motion to suppress.

Defendant next argues that the trial court abused its discretion when it admitted evidence of the circumstances surrounding a 1995 home invasion involving defendant. Defendant contends that this evidence was inadmissible under MRE 404(b). A trial court's decision to admit evidence under MRE 404(b) is reviewed for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

Under MRE 404(b)(1), "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

However, "other acts" evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), citing MRE 404(b). MRE 404(b) is a rule of inclusion, not a rule of exclusion. *People v Katt*, 248 Mich App 282, 303; 639 NW2d 815 (2001).

To be admissible under MRE 404(b)(1), other acts evidence: (1) must be offered for a proper purpose, i.e., to prove something other than a character or propensity theory; (2) must be relevant under MRE 402, as enforced through MRE 104(b); and (3) the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Further, "the trial court, upon request, may provide a limiting instruction under Rule 105." *VanderVliet, supra* at 75. "The prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b)." *Knox, supra* at 509, citing *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

We conclude that it was not an abuse of discretion for the trial court to admit evidence of the 1995 home invasion. *Sabin (After Remand), supra* at 55. First, the prosecutor offered the evidence for the proper purpose of showing that defendant had a common "scheme, plan, or system in doing an act." MRE 404(b).

Second, the evidence was relevant. Evidence is relevant if it tends to make a fact of consequence to the action more or less probable than it would be in the absence of such evidence. MRE 401. Evidence regarding the circumstances surrounding the 1995 home invasion tended to show that defendant had common scheme, plan or system in completing a home invasion. The evidence made more likely the prosecution's theory that defendant was the person who committed the instant offense because of the similar methods used during each home invasion. "[E]vidence . . . that establish[es] a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin (After Remand), supra* at 62.

Third, the probative value of the 1995 offense is not substantially outweighed by unfair prejudice pursuant to MRE 403. *Knox, supra* at 509, quoting *VanderVliet, supra* at 74-75. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The evidence regarding defendant's prior act is not so inflammatory that the jury would give it preemptive or undue weight. Further, the probative value of the 1995 offense was substantial in light of the circumstantial nature of the prosecution's case. Moreover, the determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is "best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002) (quotations omitted). Therefore, we defer to the trial court's determination of the prejudicial effect of the evidence.

Finally, the trial court issued a proper limiting instruction to the jury. A jury is presumed to follow the trial court's limited use instruction. *People v Frazier (After Remand)*, 446 Mich 539, 542; 521 NW2d 291 (1994). A limiting instruction can protect the defendant's right to a

fair trial. *Magyar, supra* at 416. Therefore, the trial court did not abuse its discretion in admitting evidence of defendant's 1995 home invasion.

Defendant separately argues that the other acts evidence was dissimilar to the circumstances surrounding the present offense. However, to be admissible, the evidence need not be unusual or distinctive, but rather, "it need only exist to support the inference that the defendant employed that plan in committing the charged offense." *People v Ackerman*, 257 Mich App 434, 440-441; 669 NW2d 818 (2003) (internal quotations and citations omitted). Moreover, defendant's argument goes to the weight of the evidence, not its admissibility. Accordingly, defendant is not entitled to appellate relief on this ground.

Defendant next argues that the prosecution presented insufficient evidence to support his conviction. This Court reviews de novo challenges to the sufficiency of the evidence. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citations omitted). This standard is deferential and requires that this Court draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The offense of first-degree home invasion requires the prosecution to prove beyond a reasonable doubt that defendant either broke and entered a dwelling or entered without permission, with the intent to commit a felony, larceny, or assault in the dwelling, or that he actually committed a felony, larceny, or assault while entering, present in, or exiting the dwelling, and that defendant was either armed or another person was lawfully present in the dwelling. MCL 750.110a(2); *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004). The elements of the underlying breaking and entering offense are: "(1) breaking and entering or (2) entering the building (3) without the owner's permission." *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). Identity is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976); *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The evidence shows that the homeowner was awakened on the morning of the incident by a loud noise downstairs, that she later discovered that the back door wall window had been shattered by a large rock and that she found several items missing from inside her home. Glass from the back window was both inside the house near the location of the missing items and outside on the back patio. Further investigation of the exterior of the house revealed that two screens had been cut along the edge of the window frame using a sharp edge and that there were pry marks consistent with the use of a flat edge tool along each window frame near the locks. The evidence shows that a lawn chair had been moved underneath an opened kitchen window and that a partial shoe print had been left on the seat of the chair. The shoe print on the chair matched the tread design on defendant's shoes. Defendant was arrested approximately one-half

to three-quarters of a mile away from the scene of the crime in possession of gloves, a single edged razorblade, a flat head screwdriver and $225 in cash. During his arrest, it was noted that tiny shards of glass were embedded in defendant's hat. Officer John Hunter testified that he and a canine unit tracked from the opened gate in the rear of the victim's residence to defendant's shoes, which were left at the location of his arrest. The route taken by the canine unit during the track was consistent with the location where Boal initially saw defendant. Subsequent analysis of glass recovered from the door wall window revealed the presence of two colors of glass, gray and green, and that each had a different refractive index. One of the glass shards removed from the bottom of defendant's shoes matched the color and refractive index of the green glass and a second glass shard from defendant's shoe matched the color and refractive index of the gray glass. According to the testimony of the forensic scientist, each shard removed from defendant's shoes could have originated from the shattered back door window at the victim's residence. Viewing the foregoing evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to support defendant's conviction.

Finally, defendant argues that his sentence violates the state and constitutional prohibitions against cruel and unusual punishment. Because defendant failed to properly preserve the issue by making an objection at sentencing, this Court's review is limited to whether there was plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Both the United States and Michigan Constitutions prohibit cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). Thus, if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing unless there was an error in the scoring of the guidelines or inaccurate information relied on in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Further, a sentence within the guidelines range or which is proportionate to the offense and the offender does not constitute cruel and/or unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004); *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003).

Defendant does not dispute that his sentence is within the properly calculated guidelines range applicable to his offense. Moreover, the lower court record reveals that the trial court properly sentenced defendant within the guidelines range. Thus, defendant's sentence is presumptively proportionate. *Drohan, supra* at 91-92; *People v Moseler*, 202 Mich App 296, 300; 508 NW2d 192 (1993). Furthermore, defendant does not argue that the trial court improperly scored the guidelines or that the trial court relied on inaccurate information in determining his sentence. Because the sentence is not disproportionate in relation to the crime, we conclude that it does not constitute cruel or unusual punishment. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993); see also *Drohan, supra* at 92.

Therefore, defendant has failed to establish plain error on appeal and he is not entitled to resentencing.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto